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IN THE
COURT OF APPEALS OF INDIANA

RODNEY FLEMING,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 46A05-0705-CR-252
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LaPORTE SUPERIOR COURT
The Honorable Walter P. Chapala, Judge
Cause No. 46D01-0101-CF-7

September 10, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

BRADFORD, Judge

Rodney Fleming appeals from the sentence imposed following his guilty plea to Class A felony Arson.[1] We affirm.

FACTS

On December 30, 2000, after Fleming "got into it" with his semi-invalid father Albert Fleming, Sr., he doused a pile of clothing with gasoline at Albert's home in LaPorte County and set it aflame. (Tr. 8-10). Fleming then left while the fire was still active, and it eventually consumed the home. As a result of the fire, Albert died. The State charged Fleming with murder, a felony. Pursuant to a written plea agreement, Fleming ultimately pled guilty to Class A felony arson, and, on November 15, 2001, the trial court sentenced him to forty years incarceration. The trial court found Fleming's criminal record to be an aggravating circumstance. On May 4, 2007, Fleming filed his notice of appeal, after being granted leave to do so by the trial court.[2]

DISCUSSION AND DECISION

I. Whether the Trial Court Abused its Discretion in Sentencing Fleming

"In general, 'the law in effect at the time that the crime was committed is controlling.'" *Walsman v. State*, 855 N.E.2d 645, 650 (Ind. Ct. App. 2006), *reh'g denied* (2007) (quoting *Holsclaw v. State*, 270 Ind. 256, 261, 384 N.E.2d 1026, 1030 (1979)). Because Fleming committed his crime in 2000, we will therefore apply the law in effect at that time. In 2000, if a trial court relied on aggravating or mitigating circumstances to

[1] Ind. Code § 35-47-2-1 (2000).

[2] The State cross-appeals, contending that the trial court abused its discretion in granting Fleming leave to file a belated notice of appeal. Because we decide the substantive issues in favor of the State, we elect not to address its procedural issue.

deviate from the presumptive sentence, it was required to (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance has been determined to be mitigating or aggravating; and (3) articulate the court's evaluation and balancing of circumstances. *Wooley v. State*, 716 N.E.2d 919, 929 (Ind. 1999) (citing *Harris v. State*, 659 N.E.2d 522, 527-28 (Ind. 1995)). When a sentence more severe than the presumptive is challenged on appeal, the reviewing court will examine the record to insure that the sentencing court explained its reasons for selecting the sentence it imposed. *Francis v. State*, 817 N.E.2d 235, 237 (Ind. 2004) (citing *Lander v. State*, 762 N.E.2d 1208, 1215 (Ind. 2002)).

As the Indiana Supreme Court recently noted, one thing that is as true today as it was in 2000 is that "sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion." *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007) (citing *Smallwood v. State*, 773 N.E.2d 259, 263 (Ind. 2002)). An abuse of discretion occurs if the decision is "'clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.'" *Id*. (quoting *K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2006)).

Fleming contends that the trial court abused its discretion by giving his criminal history too much weight. It is well settled that a single aggravating circumstance may be sufficient to support an enhanced sentence. *Soliz v. State*, 832 N.E.2d 1022, 1030 (Ind. Ct. App. 2005) (citing *Walter v. State*, 727 N.E.2d 443, 448 (Ind. 2000)), *trans. denied*. "And a defendant's prior criminal history alone can support an enhanced sentence." *Id*.

(citing *Buchanan v. State*, 699 N.E.2d 655, 657 (Ind. 1998)). Prior convictions may be considered to have significant aggravating weight depending on the circumstances of the case. *Waldon v. State*, 829 N.E.2d 168, 182 (Ind. Ct. App. 2005) (citing *Westmoreland v. State*, 787 N.E.2d 1005, 1010 (Ind. Ct. App. 2003)), *reh'g denied, trans. denied*. "The significance afforded to a defendant's criminal history depends upon the gravity, nature, and number of the prior offenses as they relate to the current offense." *Id*. (citing *Ballard v. State*, 808 N.E.2d 729, 736 (Ind. Ct. App. 2004), *trans. granted, aff'd in relevant part*, *Ballard v. State*, 812 N.E.2d 789 (Ind. 2004)).

We conclude that Fleming's criminal history was properly found to be an aggravating circumstance. Although only twenty-four when he committed the instant crime, Fleming had already managed to amass an extensive criminal record. As a juvenile and beginning when he was fifteen, Fleming had true findings for forgery, stalking, theft, and curfew violation, for which he received probation. As an adult, Fleming has Class A misdemeanor convictions for two counts of criminal conversion, two counts of battery, and resisting law enforcement; Class B misdemeanor convictions for battery and criminal mischief; and a Class C misdemeanor conviction for an "ABC violation."[3] It should also be noted that he had apparently victimized his father before, as the victim in one of his criminal conversion convictions is listed as "Albert Fleming." Additionally, Fleming has twice had probation revoked.

[3] It seems likely that "ABC violation" refers to illegal possession of alcohol by a minor. Indiana Code section 7.1-5-7-7 provides, in part that "[i]t is a Class C misdemeanor for a minor to knowingly … possess an alcoholic beverage; … consume it; or … transport it on a public highway when not accompanied by at least one (1) of his parents or guardians."

Although Fleming has no prior felony convictions, his three battery convictions, as well as the instant conviction, indicate an unwillingness to respond to conflict in an appropriate fashion, to say the least. Moreover, although Fleming's prior convictions are relatively minor (at least compared to a Class A felony), they are myriad. By the age of twenty-four, Fleming already had eight criminal convictions to go along with his four juvenile true findings. We cannot say that the trial court abused its discretion in enhancing Fleming's sentence by ten years based on the gravity, nature, and number of his prior offenses.

Fleming also contends that the trial court abused its discretion in failing to find his guilty plea to be mitigating. "An allegation that the trial court failed to identify a particular mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record." *Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005) (citing *Firestone v. State*, 774 N.E.2d 109, 114 (Ind. Ct. App. 2002)), *trans. denied* (2006). "Additionally, the trial court is not required to include within the record a statement that it considered all proffered mitigating circumstances. Rather, only those considered to be significant should be included." *Id*. "Moreover, the trial court is not obligated to weigh or credit the mitigating factors the way a defendant suggests that they should be." *Id*. (citing *Abel v. State*, 773 N.E.2d 276, 280 (Ind. 2002)).

Here, we initially observe that Fleming did not advance an argument to the trial court that his decision to plead guilty should be considered a mitigating circumstance. Consequently, this issue is waived. *See Simms v. State*, 791 N.E.2d 225, 233 (Ind. Ct.

App. 2003) (holding that if the defendant fails to advance a mitigating circumstance at sentencing, this court will presume that the factor is not significant, and the defendant is precluded from advancing it as a mitigating circumstance for the first time on appeal).

Waiver notwithstanding, our Supreme Court has also determined that a guilty plea does not automatically amount to a significant mitigating factor. *See Sensback v. State*, 720 N.E.2d 1160, 1165 (Ind. 1999). A guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one. *Id*. Fleming received a substantial benefit in exchange for his guilty plea, in that the State dismissed its murder charge against him. Given that Fleming could have been sentenced to up to sixty-five years of incarceration had he been found guilty of murder, we cannot say that the trial court would have abused its discretion in refusing to find his plea to be mitigating, had he argued it.

II. Whether Fleming's Sentence is Appropriate

We "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). "Although appellate review of sentences must give due consideration to the trial court's sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied." *Shouse v. State*, 849 N.E.2d 650, 660 (Ind. Ct. App. 2006), *trans. denied* (citations and quotation marks omitted).

The nature of Fleming's offense was the arson of his father's home following an argument, which resulted in Albert's death. Even if Fleming did not intend that Albert die, that does not diminish the impact of his crime. Fleming's character is that of a remorseless criminal whose frequent contacts with the criminal justice system have not caused him to reform himself. As previously mentioned, Fleming has four true findings and eight prior criminal convictions, some of them for violent crimes. We would also note that several of those convictions were originally charged as felonies but later reduced to misdemeanors, apparently in exchange for guilty pleas.

Although Fleming claims to have felt "grief, shock and fear since the death of [Albert,]" (Tr. 41), the only evidence of this is his self-serving statement, and his other actions belie this contention to some extent. Fleming, at various times during the proceedings, blamed the entire incident on Avery Rivera, who apparently was a tenant of Albert's behind in his payments. Moreover, Fleming claimed several times that he had extinguished the fire before leaving his father's house, until finally admitting that he had not done so. In light the nature of his offense and his character, Fleming's sentence is appropriate.

The judgment of the trial court is affirmed.

NAJAM, J., and MATHIAS, J., concur.